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UNCLAS SECTION 01 OF 03 SAN SALVADOR 000464

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E.O. 12958: N/A

TAGS: [KIPR](#) [ETRD](#) [ECON](#) [ES](#) [CAFTA](#)

SUBJECT: OPTIONAL 2006 SPECIAL 301 REPORT

REF: STATE 14937

1. Summary: On December 15, 2005, the Legislative Assembly passed a number of IPR-related reforms to meet CAFTA-DR obligations. Enforcement remains weak, but the government appears willing to step-up efforts once CAFTA-DR is in force. However, institutional weaknesses in law enforcement will remain an important constraint on the government's ability to enforce IPR laws. Regular training and technical assistance would address some of these deficiencies. End summary.

TRIPS Compliance, FTA Implementation, and Other IP-Related Issues

2. On December 15, 2005, the Legislative Assembly passed a number of IPR-related reforms to meet CAFTA-DR obligations. President Sacá signed these bills into law on January 9. Revisions to the 1993 Intellectual Property Promotion and Protection Law aim to strengthen copyrights by improving the definition of audio-visual work; limiting the use of temporary copies of literary and artistic works, recordings, and performances; and extending the term for copyright protection from 50 to 70 years.

3. The reforms extend IPR protection to satellite signals and the content they carry and specifically prohibit the importing, manufacturing, or distribution of any device primarily used to decode a codified satellite signal without authorization. They also prohibit the reception and subsequent distribution of a signal that originated as a codified satellite signal.

4. Medicines, previously granted 15-year patents, are now eligible for 20-year protection, although in practice 20-year terms have been provided since 2000. Industrial designs are now protected for 10 years; the previous term was 5 years. In addition, the reforms extended patent terms to compensate for unreasonable delays in granting the patent, as well as unreasonable curtailment of the effective patent term as a result of the marketing approval process for pharmaceutical products. Patent holders also have exclusive distribution rights.

5. The amended law calls for patent linkage to prevent marketing approval for copies of patented medicines. Data exclusivity is extended to pharmaceuticals and agricultural chemicals by prohibiting copycat manufacturers from submitting another firm's test data to regulatory authorities. The periods of protection are five years for pharmaceuticals and ten years for agricultural chemicals.

6. The Legislative Assembly also revised the 2002 Trademarks and Other Distinctive Signs Law. Certification marks and sounds are now protected as trademarks. Trademark or distinctive signs may not be registered if doing so would cause confusion with an already registered one. The reforms set out transparent rules for the registration and use of marks and geographic indicators. For example, the use of confusing geographic indicators in marketing a product or service is prohibited, and foreign appellations of origin may now be registered. Clear rules for domain-name management, including a dispute resolution procedure to prevent trademark cyber-piracy, are also established.

7. Reforms to the Penal Code intend to strengthen law enforcement efforts to discipline IPR violations. Maximum and minimum jail terms for a variety of IPR crimes were increased under the new law, with the terms depending on the severity of the offense. The punishment for most copyright infringement, including unauthorized reproduction, import, export, and wholesale distribution, is now two to four years in

jail, with four to six years possible for more serious circumstances. Illegally downloading satellite signals is also subject to a two to four year jail term, as are trademark violations. The Penal Code was revised to authorize enforcement agencies to seize suspected pirated and counterfeit goods, the equipment used to make or transmit them, and documentary evidence. The courts have the authority to order the forfeiture and/or destruction of such items. Enforcement agencies can also take action at the border against pirated or counterfeit goods without waiting for a formal complaint.

Use/Procurement of Government Software

18. In 2002, the Salvadoran Government, with the support of the Business Software Alliance (BSA), launched a voluntarily legalization campaign that BSA believes was successful in reducing the piracy rate for software used in government institutions to 25 percent; in some institutions, BSA reports that there is no piracy or only 5 percent piracy. However, the Ministry of Health, Electoral Supreme Court, National Civilian Police, Human Rights Office, and the Attorney General's Office have made few advances in their legalization processes, according to BSA. BSA is planning to launch a new anti-piracy campaign after March elections and CAFTA-DR's entry into force.

Enforcement

19. Music and software piracy are the main forms of copyright violations in El Salvador. Between January and October 2005, the Attorney General's office received 69 complaints of music copyright violations. During that period, the Attorney General's office carried out 425 raids, seizing 231,726 compact disks, 36,016 cassette recordings, and 99,320 movies. Meanwhile, the Business Software Alliance (BSA) estimates the rate of software piracy at 80 percent. While music and software piracy are the main concerns, there has also been concern expressed about inadequate enforcement of cable broadcast rights and the competitive disadvantage it places on legitimate providers of this service. Regarding trademark violations, there were 11 complaints for counterfeiting or illegal use of trademarks filed in 2005 with the Attorney General's office. There were 12 raids to seize products with such trademarks.

110. McDonald's continues to be involved in a long-term trademark dispute with a former franchisee. The dispute is still not fully resolved. In June 2003, the Supreme Court ruled in favor of McDonald's and the company was allowed to remove infringing names and arches from the restaurants of the former franchisee. In December 2005, an appeals court ruled against McDonald's on a related contractual issue, awarding the former franchisee \$24 million in compensation and damages. McDonald's is appealing the ruling to the Supreme Court.

111. Although PhRMA did not name El Salvador in its 2006 Special 301 submission, as it had in years past, El Salvador still does not provide TRIPS-compliant protection for test data for new pharmaceuticals. The Superior Council for Public Health (CNSP), which is tasked with providing marketing approval for new drugs, continues to allow a copy-cat manufacturer to submit an innovator's test data in place of its own. CNSP staff have told ECONOFF that with the implementation of CAFTA-related IPR reforms, this practice will no longer be acceptable, and the government will be obligated to protect test data for pharmaceuticals for a five-year term. CNSP staff also recognize the need to establish an effective system of patent linkage with the National Registry Center, where patents are registered.

112. There is a widespread view that most Salvadoran judges lack adequate legal preparation to adjudicate IPR cases. Currently, IPR violations are seen in mercantile and penal Courts. David Gonzalo Cabezas, President of the National Judicial Counsel (CNJ), has suggested there should be "specialized judges exclusively dedicated to apply justice in intellectual property," but no plans exist to establish such specialized courts. He stated that they have discussed and are trying to address the issue with the World Intellectual Property Organization (WIPO) and with the Supreme Court of Justice. In 2004, the Attorney General's Office merged the independent Intellectual Property Crimes Unit with the larger Crimes Against Private Property Division, which handles fraud, theft, and robbery. This unit is called the Private Property and Intellectual Property Unit. The staff includes one unit chief and five prosecutors.

¶13. Anticipation of stricter enforcement of IPR laws under CAFTA-DR has evoked occasionally violent protests from vendors of illicit CDs and DVDs; they claim that 60,000 people will see their livelihoods destroyed with CAFTA-DR implementation. The Ministry of Economy, with Post's assistance, has been working with representatives of the U.S. recording industry to implement what executives from the Recording Industry Association of America (RIAA) and International Federation of the Phonographic Industry (IFPI) describe as a conversion program, modeled after a similar program in Mexico. Essentially, informal vendors now selling stolen music and video would have the opportunity to sell legitimate catalogue music at competitive prices through a distribution system backed by concessional financing.

¶14. Comment: Post has impressed upon the Ministry of Economy the importance of zero-tolerance enforcement of the new IPR law if this conversion program is to succeed. To prepare for that enforcement push, Post's Immigration and Customs Enforcement (ICE) Attache recently organized training for police, prosecutors, and judges on how to enforce the new IPR laws, especially the ex-officio search and seizure provisions. The police, in consultation with the ICE Attache, are developing an aggressive enforcement plan that will first target large-scale distributors of stolen and video, cutting off the vendors supply. Vendors will also be subject to enforcement activity under this plan. End comment.

Treaties

¶15. The Legislative Assembly ratified the 1996 WIPO Copyright Treaty in March 6, 2002, and the WIPO Performance and Phonograms Treaty in May 20, 2002. Besides, in compliance with CAFTA provisions, El Salvador should ratify, within specified time frames, the International Convention for the Protection of New Varieties of Plants, the Trademark Law Treaty, the Brussels Convention Relating to the Distribution of Programme-Carrying Satellite Signals, and the Patent Cooperation Treaty.

Training

¶16. Implementing IPR laws consistent with CAFTA-DR will seriously test the capacity of the Salvadoran courts and law enforcement agencies. We believe the executive branch is committed to accomplishing this task, although it is one of the most sensitive areas for CAFTA-DR implementation. That political will, however, must be matched with the rule of law if IPR is to be protected in a manner consistent with El Salvador's trade obligations. Law enforcement officers and prosecutors will require significant training in how to best use their new ex-officio search and seizure powers. Judges, too, must be educated. Post's ICE Attache has taken a leading role in providing such training, and in January offered an introductory course to police officers, prosecutors, and judges. Salvadorans have also attended USPTO's two-part CAFTA-DR academy. However, additional regular training on identifying pirated goods would be useful--industry experts could play a helpful role in this effort. Assistance will also be required to improve evidence collection, in terms of analyzing computer hardware and software, and to establish storage facilities for confiscated goods. Training for judges, meanwhile could be coursed through the National Judicial Counsel (CNJ), the court system's training arm. One potentially effective way to do so would be through the development of an IPR-law curriculum that could become a regular part of the CNJ's course offerings. Technical assistance would be useful in the area of data protection for pharmaceuticals--helping the Superior Council for Public Health design an information network with the National Intellectual Property Registry would be an effective means to ensuring that patent linkage is implemented.

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